

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TERRY DEGROOT,	:	CIVIL ACTION NO. 2:07-cv- 4091
	:	
	:	
Plaintiff	:	
	:	
v.	:	
	:	
KIDSPEACE,	:	
	:	
Defendant	:	JURY TRIAL DEMANDED

**DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S AMENDED COMPLAINT, OR IN
THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Defendant, KidsPeace, by and through its attorneys, Flamm, Boroff & Bacine, P.C., hereby files this Motion to Dismiss or in the alternative, for Summary Judgment.

In support thereof, Defendant states the following:

1. Plaintiff commenced this action by filing a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”) on or about March 19, 2007.
2. Plaintiff also requested that the charge be cross-filed with the Pennsylvania Human Relations Commission (“PHRC”). Defendant has yet to receive any notice indicating that the PHRC has received the charge.
3. In her charge, Plaintiff alleged that KidsPeace discriminated against her because of her purported disability and her age. However, nowhere in the charge does Plaintiff allege that she was disabled.
4. In the charge, Plaintiff alleged only that she had an ongoing medical

condition that was exacerbated by her work and that she requested a two (2) month restriction of limiting her work to forty (40) hours per week during her regular 9 a.m. to 5 p.m. shift.

5. With regard to her allegations of age discrimination, Plaintiff alleged only that her position was filled by someone who is younger.

6. Prior to receiving a right-to-sue letter from either the EEOC or PHRC and prior to waiting the statutorily required time for either the EEOC or the PHRC to conduct an investigation into her allegations of disability discrimination, Plaintiff initiated this action less than four (4) months after the charge was filed by filing a Writ of Summons in the Court of Common Pleas of Lehigh County on or about July 6, 2007.

7. Thereafter, Plaintiff filed her Complaint in this matter on or about August 29, 2007.

8. In her original Complaint, Plaintiff alleged causes of action for: disparate treatment age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq.; disparate impact age discrimination under the ADEA; disability discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq.; unspecified violation of the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951 et seq.; and an unspecified violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206 et seq.

9. On or about September 28, 2007, Defendant timely removed this case from the Court of Common Pleas of Lehigh County, Pennsylvania to the United States District Court for the Eastern District of Pennsylvania.

10. On or about October 4, 2007, Defendant filed its Motion to Dismiss Plaintiff's original Complaint.

11. In response to Defendant's Motion to Dismiss, Plaintiff filed an Amended Complaint on or about October 18, 2007.

12. In the Amended Complaint, Plaintiff withdrew her disparate impact age discrimination claim under the ADEA as well as all of her claims under the PHRA. Other than the deletion of these causes of action, the allegations of the Amended Complaint are virtually identical to those contained in the original Complaint.

13. Plaintiff's remaining claim for disability discrimination under the ADA should be dismissed because Plaintiff has failed to exhaust her administrative remedies with regard to this claim.

14. Plaintiff's remaining claim for disability discrimination under the ADA should be dismissed because Plaintiff is not disabled within the meaning of the ADA as a matter of law.

15. Plaintiff's claim under the FLSA should be dismissed for failure to state a claim upon which relief can be granted.

Wherefore, Defendant respectfully requests that the Court grant its Motion and dismiss Counts II and III of the Amended Complaint with prejudice, and allow Defendant ten (10) days from the date of the Court's Order dismissing the Amended Complaint to file a Motion for Attorneys' Fees and Costs pursuant to the ADA, 42 U.S.C. § 12205, and other applicable law.

Respectfully submitted,

FLAMM, BOROFF & BACINE, P.C.

By: /s/ Sean M. Hart smh82084
Sean M. Hart, Esquire
I.D. No. 82084
Westfield Corporate Ctr., Suite 310
4905 W. Tilghman Street
Allentown, PA 18104
610-336-6800

Attorneys for Defendant,
KidsPeace

Date: November 5, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRY DEGROOT,	:	CIVIL ACTION NO.
	:	
	:	
Plaintiff	:	
	:	
v.	:	
	:	
KIDSPEACE,	:	
	:	
Defendant	:	JURY TRIAL DEMANDED

CERTIFICATE OF SERVICE

I, Sean M. Hart, Esquire, attorney for Defendant, KidsPeace, certify that on this 5TH day of November 2007, service of a true and complete copy of the above and foregoing Defendant's Memorandum of Law and accompanying exhibits, was made upon each party or attorney of record herein via electronic filing and U.S. first class mail upon the individual set forth below:

Donald P. Russo, Esquire
117 East Broad Street
P.O. Box 1890
Bethlehem, PA 18016

Attorney for Plaintiff

FLAMM, BOROFF & BACINE, P.C.

By: /s/ Sean M. Hart smh82084
Sean M. Hart, Esquire